FILE COPY

APR 19 1932

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 602

ERIE RAILROAD COMPANY,

Petitioner,

vs.

MICHAEL DUPLAK, by his next friend, Steve Duplak, and STEVE DUPLAK and ANNIE DUPLAK, individuals,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

GEORGE S. HOBART,
Counsel for Petitioner.

SUBJECT INDEX.

ARGUMENT.

PAGE

I.

Reply to Point I of Brief for Respondents..... 1

II.

Reply to Point II of Brief for Respondents..... 5

CASES CITED.

Erie R. R. Co. v. Hilt, 247 U. S. 97; 62 L. Ed. 1003.. 2

Erie R. R. Co. v. Hilt, 246 Fed. 800..... 2

Keller v. Erie R. R. Co., 183 N. Y. 67; 75 N. E. 965. 4, 5

Lamphear v. New York Central R. Co., 194 N. Y. 172; 86 N. E. 1115..... 4

New York etc. R. Co. v. Fruchter, 260 U. S. 141; 67 L. Ed. 173..... 3

Rhodehouse v. Director General of Railroads, 95 N. J. L. 355..... 3

Sioux City R. Co. v. Stout, 84 U. S. 657; 21 L. Ed. 745 3

United Zinc Co. v. Britt, 258 U. S. 268; 66 L. Ed. 615 3

STATUTES.

N. Y. Laws 1892, p. 1394, c. 676, sec. 53..... 5

Supreme Court of the United States

OCTOBER TERM, 1931.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MICHAEL DUPLAK, by his next friend, Steve Duplak, and STEVE DUPLAK and ANNIE DUPLAK, individuals,
Respondents.

No. 608.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

I.

Reply to Point I of Brief for Respondents.

(Page references are to brief for respondents, except where otherwise noted.)

(Page 2) Counsel state that the assignment of error that the court's alleged instruction to the jury that the

brdige was an attractive nuisance was not argued in the brief, and "appears to have been abandoned."

Counsel have overlooked page 5 of our original brief where this point is included as one of the assignments intended to be urged; the argument thereon is included in Point I.

(Page 4) Counsel argue that the railroad company has waived the benefit of the statute "by acquiescence," thereby leaving its land "impressed with the doctrine of attractive nuisance." But this argument disregards the admitted facts that the right of way was inclosed so far as was physically possible to do so by a fence (see the several photographs in evidence), and that at one end of the bridge there was a sign forbidding persons to go upon it (R. 26, 27, 66, 71); the mere fact that children, from time to time, used parts of the bridge for "walking, standing or playing," without any lawful right so to do, and contrary to the warning, is insufficient to prove "acquiescence"—even if the company had any right to "acquiesce" in a practice which violated a statute.

(Page 5) Counsel attempt to distinguish the facts in the case of *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97; 62 L. Ed. 1003. We have quoted at page 12 of our original brief the statement of the facts in the report of that case in the Circuit Court of Appeals (246 Fed. 800). The present case is stronger for the company, in that barriers were erected in the form of fences on the right-of-way lines, so far as that was practicable without interfering with the movement of cars across the bridge, and in that a warning sign was erected forbidding all persons to go upon the bridge.

(Page 5) Counsel cite *United Zinc Co.* v. *Britt*, 258 U. S. 268; 66 L. Ed. 615. In that case Mr. Justice Holmes, speaking for the majority of the court, said:

> "There can be no general duty on the part of the landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

Chief Justice Taft and Mr. Justice Day concurred in a dissenting opinion of Mr. Justice Clarke, wherein he said:

> "I cannot share in setting aside the verdict of the jury in this case, approved by the judgments of two courts, upon what is plainly a disputed question of fact, and in thereby overruling two decisions which have been accepted as leading authorities for half a century; * * *" (p. 619).

It will be noted that three members of this Court were of the opinion that the *Britt* case overruled *Sioux City R. Co.* v. *Stout*, 84 U. S. 657, 21 L. Ed. 745, and dissented on that ground. It is unnecessary to determine whether the *Stout* case was overruled in that, or in the later decision of this Court in *New York etc. R. Co.* v. *Fruchter*, 260 U. S. 141, 67 L. Ed. 173; as, we submit, there could be no invitation or license to the injured boy under the undisputed facts in the present case, to walk or play upon the railroad tracks in the face of fences and a warning sign and in direct violation of a statute, making it unlawful "for any person" other than employees to use railroad tracks for such purposes.

(Page 7) Counsel say that the case of *Rhodehouse* v. *Director General of Railroads*, 95 N. J. L. 355, held that the statute was inapplicable. But in that case the plain-

tiff's decedent was an intending passenger and was killed while crossing from one side of the tracks to the other side by means of a passageway which was provided by the railroad for the use of passengers; obviously, the statute would have no application to such facts in view of the proviso "it shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

(Page 7) Counsel say that *Lamphear* v. *New York Central R. Co.*, 194 N. Y. 172 (also reported in 86 N. E. 1115), construed a "somewhat analogous" statute to be inapplicable to a situation where the public had been accustomed to cross railroad tracks at a point other than a street crossing, with the acquiescence and permission or consent of the railroad company. The opinion shows that the plaintiff's decedent was killed while crossing the railroad tracks on a foot path leading from one side to the other through openings in the fences. The court distinguished the earlier case of *Keller* v. *Erie R. R. Co.*, 183 N. Y. 67, 75 N. E. 965, on the ground that there was evidence of public use of the path for many years and that the defendant had at some time put up turnstiles, and, hence, the trial judge charged that it seemed to be conceded that the public, with the acquiescence and with the permission and consent of the railroad company, had been accustomed to cross the railroad tracks at the point where the accident happened. The court pointed out that no exception was taken to such instruction and said that there was "a conceded right of way, or public passageway"; and that, therefore, the question whether the evidence justified a finding of a public passageway was eliminated.

In the *Keller* case the majority opinion held that the statute applied to an accident which occurred on railroad tracks that crossed an unoccupied tract of land between city streets which decedent and other persons for many

years had been accustomed to use as a short cut from one street to another. Gray, J., said (italics ours):

> "I think that it was not within the power of the defendant to permit or to suffer persons not in its employment to walk upon and along its tracks at a place where there was no highway and but an intersection of railroad tracks, and that no length of acquiescence in their doing so, under the circumstances of this case, could create a right of user, by license or by sufferance. This ought to be clear from section 53 of the railroad law (Laws 1892, p. 1394, c. 676), which was intended to protect the traveling public, as well as the railroad companies. * * * It is not easy, if at all possible, to see how any right, as by license, could be acquired through acquiescence to do something which was so clearly in violation of the statutory inhibition. *An act expressly prohibited by the public statute is, in its inception and always must continue to be, unlawful.* The defendant's powers and capacity to act are defined and controlled by statute law and, as a creature of the statute, it could neither expressly nor passively confer a right which the statute denied. Whoever walks upon or along the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and the company's servants are under no other obligation than to refrain from willfully or recklessly injuring him."

II.

Reply to Point II of Brief for Respondents.

(Page 9) Counsel state that petitioner "concedes" that it had established a custom of giving certain signals and that a member of the crew "used" to come on the bridge and clear it before a train would move upon it. This

statement is inaccurate. The only concession is found on page 23 of Record where it was admitted that children played on the bridge, from time to time, during twenty years; and the only evidence as to the clearing of the bridge is that of a twelve-year-old boy, Tony Gonsiske (R. 38), who, in answer to the question as to what the brakeman would do "when they wanted to move trains," said: "They would come on the bridge and clear the track" (R. 42, 46). This testimony is indefinite as to whether the "clearing of the track" applied to a situation where (as in this case) cars were already standing on the bridge. But, in any event, the evidence is that the back-up signal for the movement of the cars was given in the usual way, that is, from the conductor to the rear brakeman and by him to another brakeman who was on the head [illegible], next to the engine, and by the latter to the engineer (McCauley, R. 93, 100, 106, 107, 109). Before this signal was given, the conductor looked to see if the bridge was clear (R. 98, 99); the brakeman who was standing on the hind car, a few feet from the standing cars, looked "up the bridge" and had a clear view of the entire walk:

> "Q. Was there anybody on that walk? A. No, sir" (R. 104, 105).

(Page 9) Counsel say that the petitioner is mistaken in claiming that the boy could not be seen because he was concealed under one of the freight cars, and say that this "error" is demonstrated by the testimony of Chanowitz. It is quite true that this witness saw the boy and described his position on the bridge, but at the time the witness saw the boy the witness himself was crossing the bridge on the plank walk (R. 34, 35); at that time the boy was on the other side of the bridge from the plank walk and "under a standing car" (R. 35).

(Page 10) Counsel say that petitioner concedes that none of its crew saw the boy, and then say: "This is no doubt due to their failure to look." But members of the crew who gave the back-up signals testified that they looked before the back-up signal was given and saw no one on the bridge (R. 95, 99, 103, 104, 105, 106, 107, 108).

GEORGE S. HOBART,
Counsel for Petitioner.